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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

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No. 507

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CITY OF OMAHA, a Municipal Corporation; CHARLES W. LEEMAN, Mayor; PAUL HAZE, Chief of Police; EDWARD F. FOGARTY, City Attorney; ASSOCIATED RETAILERS OF OMAHA, a Corporation; and OMAHA MASTER FURRIERS GUILD, an Unincorporated Association,

Petitioners,

vs.

FRANK BROTHERS FOOTWEAR, Inc., a Corporation,

Respondent.

o——o——o

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

o——o——o

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CITY OF OMAHA, a Municipal Corporation; CHARLES W. LEEMAN, Mayor; PAUL HAZE, Chief of Police; EDWARD F. FOGARTY, City Attorney; ASSOCIATED RETAILERS OF OMAHA, a Corporation; and OMAHA MASTER FURRIERS GUILD, an Unincorporated Association,

Petitioners,

vs.

FRANK BROTHERS FOOTWEAR, Inc., a Corporation,

Respondent.

o———o———o

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

City of Omaha, a Municipal Corporation; Charles W. Leeman, Mayor; Paul Haze, Chief of Police; Edward F. Fogarty, City Attorney; Associated Retailers of Omaha, Corporation; and Omaha Master Furriers Guild, an

Unincorporated Association, Petitioners, respectfully pray that a Writ of Certiorari issue to review the final judgment of the Supreme Court of Nebraska entered in the above-entitled cause on June 29, 1948 (Motion for Rehearing being thereafter overruled on October 16, 1948), reversing a judgment of the District Court in and for Douglas County, Nebraska, and remanding the cause, whereby the Lower Court was directed under the de novo review power of the Nebraska Supreme Court to render a permanent injunction against the Petitioners, who were Defendants below, restraining them from enforcing the Omaha Itinerant Vendors' Ordinance[1] (and its Amendment[2]) as against the Respondent, Frank Brothers Footwear, Inc.

And in support of such Petition, your Petitioners respectfully show as follows:

I.
SUMMARY STATEMENT OF THE MATTER INVOLVED

The case involves the validity of a municipal occupation tax of $15.00 a day imposed, for revenue purposes, by the Omaha Municipal Code upon itinerant vendors, as defined in the Ordinance, that is to say, persons who, like the Respondent, do not maintain a regular place of business in Omaha but who solicit orders for, make local displays of, or take orders for merchandise, as, for instance, in the Respondent's case, during two-day hotel stands at regular intervals of twice a year; and, in the

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1 The portion of the main Ordinance pertinent to the inquiry herein is set out in the Appendix hereafter.

2 The Amendment represented by Ordinance No. 15524, imposing certain additional Surety Bond and Health Certificate requirements, is, however, in the process of being repealed.

exercise of the City's police power, requiring a permit (with a permit fee of $1.00) licensing such operation and (by the Amendment to the Ordinance) imposing certain Surety Bond and Health Certificate requirements, in the first instance, to protect against fraud, imposition, misrepresentation, cheating or sharp practice, on the one hand, and, in the last, the spread of infection or contagion, on the other.

The Ordinance makes no distinction between residents and non-residents, or between those in intrastate or those in interstate business, or out-of-state or in-state merchants.

The same Ordinance (before Amendment) had theretofore been held valid with respect to a local business;[3] but, in the instant case, it was held invalid by the Nebraska Supreme Court, as applied to an interstate commerce operation, under the Constitution of the United States as a discrimination against interstate commerce, notwithstanding that the Respondent—a New York house—and other merchandising firms of like character during their regular two or three day stands in hotel rooms, without paying any tax therefor, receive, as part of the public services of local government, the police and fire protection and other services furnished by the local government and paid for by the taxpayers of the City and State (Stip., B. of Ex. 23).

Because the State of Nebraska or its municipal subdivisions have not embraced the sales tax or its concomitant use tax or an income tax as a device for raising revenue for state and local government, but have, instead, relied on, and are by law confined to, property taxes, occupation taxes, and license fees for such revenue, the Re-

3 Erwin v. City of Omaha, 118 Neb. 331, 224 N. W. 692.

spondent and merchandising firms of like character, in consequence, achieve a complete immunity or practical total exemption from any character of tax (Stip., B. of Ex. 23). They thus have attained in Nebraska an island or shelter of complete freedom from tax, if the decision under visé stands.

Nevertheless, Respondent and other like merchandising firms, by their own admissions in the Record, regularly, although intermittently, pursue a lucrative business —conducted in its local phases of the display of merchandise, solicitation of orders therefor, and the actual taking of orders therefor—within the City of Omaha and under the protective services of the local government, for which the Respondent and other like merchandising firms pay absolutely nothing (T. 18 and Stip., B. of Ex. 23).

II.

JURISDICTION

The basis upon which it is contended that this Honorable Court has jurisdiction to review the Decision and Decree in question is as follows:

a. Title 28, United States Code, 1948 Edition, Section 1257 (Chapter 646 of Public Law 773), superseding Section 237 of the Judicial Code, as amended (28 U. S. C., Section 347), providing in Sub-section (3) that, where the validity of a State Statute (often interpreted as inclusive of municipal ordinances) is drawn in question on the ground of its being repugnant to the Constitution of the United States, a final judgment or decree of the highest court of a state may be reviewed by this Honorable Court by Writ of Certiorari.

See, also, Title 28, United States Code, 1948 Edition, Sections 2104 and 2106.

b. Rule 38, Section 5, Sub-section (a) of the Rules of the Supreme Court of the United States, providing for review on Writ of Certiorari in cases where a state court has decided a federal question of substance in a way probably not in accord with applicable decisions of this Honorable Court.

III.

THE QUESTIONS PRESENTED

The controlling questions presented in this Petition are:

1. Whether a state or the municipalities therein possess power to see that interstate commerce bears with local trade its fair share of the cost of local government, notwithstanding the Interstate Commerce Clause in the National Constitution.

2. Whether a state or municipalities therein can exact compensation for the protection it, or they, afford local activities within its, or their, borders from a business otherwise interstate in character.

3. Whether an occupation tax of $15.00 a day, not exceeding, and, in fact, less than, the daily local tax burden of retail merchant competitors, is a permissible local impost not contravening the National Commerce Clause.

4. Whether such tax is forbidden under Federal Constitutional standards because it is part of a licensing measure.

5. Whether interstate commerce is subject to regulation by the state or the municipalities therein in the exercise of their police power for the protection of legitimate local interests.

6. Whether the trend towards sustaining state and local taxes, formerly regarded as outlawed by the Commerce Clause (under the so-called "Drummer" cases), is sufficiently authenticated to permit a modest and element tax upon local phases of an otherwise interstate commerce operation.

7. Whether a valid and tenable distinction can be drawn in taxation measures by a state or municipalities therein between local tradesmen and itinerant dealers, where such measures are uniformly applicable to all persons pursuing a given occupation without distinction as to residence or non-residence or intrastate or interstate character.

8. Whether an occupation tax of $15.00 a day and the requirement of a permit for itinerant vendor operations, with protective Bond and Health Certificate incidents, impose an undue burden on an interstate commerce operation falling within its scope, or is obviously discriminatory against such interstate commerce.

9. Whether a special and definable suitor interest in retail merchant associations, composed of members competitive to Respondent, and supplying in the Record their comparative tax burdens,[4] justified their intervention as protecting, securing and promoting fair competitive conditions and equalizing economic advantages.

10. Whether an injunctive remedy was available to Respondent in view of the adequacy of the legal remedy in either criminal or refund of tax proceedings.

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4 The absence of which was particularly deplored in **Nippert v. City of Richmond**, 327 U. S. 416, 66 S. Ct. 586, 90 L. ed. 760.

11. Whether compliance by the Respondent with the Ordinances in all respects, in the interval pending the appeal to the State Supreme Court, without benefit of supersedeas (denied by the Lower Court and not applied for in the State Supreme Court), rendered the appeal of Respondent moot.

These questions were all answered adversely to the contentions of the Petitioners by the Supreme Court of Nebraska.

IV.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The decision rendered by the Nebraska Supreme Court (and adhered to by the later overruling of the Petitioners' Motion for Rehearing) is manifestly not in accord with applicable and very recent decisions of this Honorable Court, particularly in the application of the Commerce Clause of the Federal Constitution.

Without here attempting to detail and enumerate all of them, your Petitioners, nevertheless, call attention to a few, particularly, the most recent—without elaborating them—as demonstrating the foregoing postulate:

1. The decision of the State Supreme Court does not mention and cannot be reconciled with the latest expression on this topic from this Honorable Court in *Memphis Natural Gas Company v. Stone*, 335 U. S. 80, 68 S. Ct. 1475, 92 L. ed. (adv. ops.) 1409, decided June 21, 1948, upholding a state franchise tax upon a wholly interstate commerce operation with respect to the public

services afforded local activities[5] incident to such interstate commerce operation.

2. The decision of the State Supreme Court likewise does not mention and cannot be reconciled with *Independent Warehouses, Inc., v. Scheele,* 331 U. S. 70, 67 S. Ct. 1062, 91 L. ed. 1346, likewise recently decided in 1947, upholding a township license tax impost by ordinance applicable to the storage of goods even though they were in the course of interstate commerce.

3. The State Supreme Court declined to follow the now well acknowledged principle that "interstate commerce must pay its way," as established in *Memphis Natural Gas Co. v. Stone,* supra (not mentioned by the State Supreme Court); *Joseph v. Carter & Weekes Stevedoring Company,* 330 U. S. 422, 67 S. Ct. 815, 91 L. ed. 993 (likewise not mentioned by the State Supreme Court); *Freeman v. Hewit,* 329 U. S. 249, 67 S. Ct. 274, 91 L. ed. 265; *Richfield Oil Corp. v. Board of Equalization,* 329 U. S. 69, 67 S. Ct. 156, 91 L. ed. 80 (likewise not mentioned by the State Supreme Court); and *Nippert v. City of Richmond,* 327 U. S. 416, 66 S. Ct. 586, 90 L. Ed. 760,— all very recent controlling decisions by this Honorable Court upon the topic.

4. The $15.00 a day occupation tax feature of the Omaha Itinerant Vendors' Ordinance cannot be considered as unduly repelling interstate commerce or as imposing an undue burden thereon in view of the relatively

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5 While **Memphis Natural Gas Co. v. Stone,** supra, was decided before the State Court's decision on June 29, 1948, it probably was not available to the State Supreme Court at the date of the decision; it was, however, brought to the State Court's attention on Motion for Rehearing.

higher taxes upheld—from the standpoint of amount alone —in *Memphis Natural Gas Co. v. Stone,* supra; *Aero Mayflower Transit Company v. Board of R. R. Commissioners,* 332 U. S. 495, 68 S. Ct. 167, 92 L. ed. (adv. ops.) 153, and *Aero Mayflower Transit Company v. Georgia Public Service Commission,* 295 U. S. 285, 55 S. Ct. 709, 79 L. ed. 1439.

5. The decision of the State Supreme Court is contrary to and does not mention on the subject of acknowledged state power to regulate interstate commerce, as, for instance, in the exercise of a municipality's police power, with respect to legitimate local purposes, *Panhandle Eastern Pipe Line Co. v. Public Service Commission,* 322 U. S. 507, 68 S. Ct. 190, 92 L. ed. (adv. ops.) 173; *Bob-Lo Excursion Co. v. Michigan,* 333 U. S. 28, 68 S. Ct. 358, 92 L. ed. (adv. ops.) 339; *Robertson v. California,* 328 U. S. 440, 66 S. Ct. 1160, 90 L. ed. 1366; *Prudential Insurance Co. v. Benjamin,* 328 U. S. 408, 66 S. Ct. 1142, 90 L. ed. 1342; and *Eichholz v. Public Service Commission,* 306 U. S. 268, 59 S. Ct. 532, 83 L. ed. 641.

6. The State Supreme Court acknowledged the proffer of the argument by your Petitioners that a trend away from the "Drummer" cases, commencing with *Robbins v. Shelby County Taxing District,* 120 U. S. 489, 75 S. Ct. 592, 30 L. ed. 694, was perceptible, but then failed to pursue the trend into the most recent cases acknowledging such trend as an accomplished fact, notwithstanding indubitable recent expressions in *Memphis Natural Gas Co. v. Stone,* supra; *Nippert v. City of Richmond,* supra; *Freeman v. Hewit,* supra (concurring opinion by Mr. Justice Rutledge); and *Richfield Oil Corp. v. State Board of Equalization,* supra. See, also, the tracing of the history

of the transition from the former *Robbins v. Shelby County Taxing District* doctrine to the present status, in the dissenting (in part) opinion of Mr. Justice Douglas in *Joseph v. Carter & Weekes Stevedoring Company*, supra.

7. The State Supreme Court failed to mention and ignored, as legally not constituting discrimination, the segregation, in the taxing and licensing measure, of itinerant vendors, contrary to *Singer Sewing Machine Co. v. Brickell*, 233 U. S. 304, 34 S. Ct. 493, 58 L. ed. 974; *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 57 S. Ct. 772, 81 L. ed. 1193; *Welch v. Henry*, 305 U. S. 134, 59 S. Ct. 121, 83 L. ed. 87; *Ford Motor Co. v. Beauchamp*, 308 U. S. 311, 60 S. Ct. 273, 84 L. ed. 304, and *Caskey Baking Company v. Commonwealth of Virginia*, 313 U. S. 117, 61 S. Ct. 881, 85 L. ed. 1223.

8. The State Supreme Court likewise misinterpreted the special interest of the Intervener retail merchant associations, as acknowledged in *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, 61 S. Ct. 586, 85 L. ed. 888; *Welch v. Henry*, supra; *Great Atlantic & Pacific Tea Co. v. Grosjean*, supra; *Nippert v. City of Richmond*, supra, and *Freeman v. Hewit*, supra, in litigation of this character, where, in addition to the municipality's proper concern in its tax revenues and its regulatory functions, such retail merchants have a distinct suitor interest based upon the competitive methods (by way of procuring freedom in such litigation from tax burdens) of competitors.

9. The decision of the State Supreme Court, in extending the injunctive remedy to the Respondent, is at odds with *Beal, County Attorney, v. Missouri Pacific Railroad Corp.*, 312 U. S. 45, 61 S. Ct. 418, 85 L. ed. 577.

10. The State Supreme Court likewise misinterpreted the effect of holdings from this Honorable Court, rendering appeals moot where there has been full compliance by a complainant, like the Respondent herein, with the Ordinance pending the appeal, without benefit of supersedeas, as in *Singer Manufacturing Company v. Wright,* 141 U. S. 696, 12 S. Ct. 103, 35 L. ed. 906, and *Little v. Bowers,* 134 U. S. 547, 10 S. Ct. 620, 33 L. ed. 1016.

The matter is of indeed grave public importance to municipalities because of the notoriously currently strained condition of their treasuries and their inability to replenish them through the common forms of taxes, especially by reason of having reached the limits of permissible property levies. The trammeling, as by the decision of the Nebraska Supreme Court, of the power to secure non-property tax revenues, especially from "untouchable" interstate commerce enterprises, therefore, operates with severe impact upon such municipalities.

It is manifest, too, that a wide uncertainty as to the limits of permissible municipal taxation over interstate commerce enterprises should be promptly allayed in order that municipalities may take an intelligent perspective of their sources of revenue in the present exigency evident on every side in their search for a greater share of all tax revenues.

Certainly, an exemption—nowhere appearing or granted—to these interstate commerce enterprises—nevertheless exploiting local opportunities in the merchandising field to the utmost—should not be permitted to continue unchecked, as against fair and reasonable local im-

posts, clement in amount, as is the one in the instant case.

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TENDER OF TRANSCRIPT OF RECORD

Your Petitioners present to this Honorable Court for filing herewith a duly certified Transcript of the entire Record in the case, as certified by the Clerk of the Supreme Court of Nebraska, which said Court is the highest Court of Law and Equity in said State of Nebraska.

o———o———o

PRAYER

WHEREFORE, your Petitioners pray that a Writ of Certiorari issue under the Seal of this Court directed to the Supreme Court of Nebraska commanding said Court to certify and send to this Court a full and complete Transcript of the Record and of the proceedings of the said Supreme Court of Nebraska had in the case numbered and entitled on its Docket No. 32370, Frank Brothers Footwear, Inc., Appellant, v. City of Omaha, a Municipal Corporation, et al., Appellees, Associated Retailers of Omaha, a Corporation, et al., Interveners and Appellees, to the end that this cause may be reviewed and determined by this Honorable Court, as provided for by the Statutes of the United States; and that the judgment therein of the said Supreme Court of Nebraska be re-

versed by this Honorable Court; and for such further relief as to this Honorable Court may seem proper.

DATED at Omaha, Nebraska, January 3, 1949.

Respectfully submitted,

CITY OF OMAHA, a Municipal Corporation; CHARLES W. LEEMAN, Mayor; PAUL HAZE, Chief of Police; EDWARD F. FOGARTY, City Attorney; ASSOCIATED RETAILERS OF OMAHA, a Corporation; and OMAHA MASTER FURRIERS GUILD, an Unincorporated Association,

Petitioners.

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Petitioners,

vs.

FRANK BROTHERS FOOTWEAR, Inc., a Corporation,

Respondent.

o——o——o

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

The following is submitted in support of the foregoing Petition. Of necessity, it is not now proposed to elaborate the merits, as well as the citations of authorities.

I.

OPINION OF THE COURT BELOW

The opinion of the Nebraska Supreme Court is reported in 149 Neb. 888, 33 N. W. (2d) 161.

Inasmuch as the case was controlled by another and identical case, decided the same day (it not being deemed requisite to seek Certiorari in both cases, as one controls the other), reference is made to the companion case of *Best & Co., Inc., v. City of Omaha*, reported in 149 Neb. 868, 33 N. W. (2d) 150, where a more extended opinion was rendered.

II.

JURISDICTION

This Honorable Court's jurisdiction is invoked pursuant to Title 28, United States Code, 1948 Edition, Section 1257, as recently enacted, effective September 1, 1948 —this Court's jurisdiction being further implemented by Title 28, United States Code, 1948 Edition, Sections 2104 and 2106—and also pursuant to Rule 38, Section 5, Sub-Section (a) of the Rules of this Court.

The date of the decision and decree of the Nebraska Supreme Court was June 29, 1948, and the Motion for Rehearing by Petitioners, as Appellees in that case, was overruled on October 16, 1948.

III.

STATEMENT OF THE CASE

A Statement of the Case appears in the foregoing Petition and such Statement is hereby adopted and by reference made a part of this Brief. We wish to amplify

it, however, to some extent for reasons of better perspective.

Respondent is a foreign New York corporation engaged in the retail sale of footwear and kindred products and through sales representatives it displayed samples of merchandise within Omaha, Nebraska, solicited orders therefor, and, from such customers as were favorably impressed, took orders for their delivery, subject to acceptance at its home office.

As appears from the Affidavit of President Livers of the Respondent, it is stated (T18):

> "* * * that the corporation does not maintain any regular place of business in Omaha, Nebraska, or within the State of Nebraska, but has solicited orders in Omaha, Nebraska, in the manner aforesaid, twice a year and for a few days at a time for more than twenty-five (25) years, and has thereby created valuable good will among its customers in that City; that the corporation now enjoys a lucrative and valuable business with customers residing in and about the City of Omaha, Nebraska, in the manner aforesaid; that the corporation desires and intends to carry on said activities in Omaha, Nebraska, in the same manner that they have been carried on in the past for many years to come; * * *."[6]

As found by the Trial Court (T50), it was the custom of the Respondent to conduct activities within Omaha following a prior circularizing campaign on prospective customers within the city, inviting to hotel stands or other temporary stands of two or three days' duration at intervals of two times a year, every year, consisting of:

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6 This distinguishes the instant case from the activities of Dorothy Nippert in Nippert v. City of Richmond, supra.

a. Solicitations of such prospective customers as resorted to the hotel or other premises in response to such invitation.

b. Displays of the Respondent's merchandise at the hotel or other premises.

c. The taking of orders from such prospective customers as were successfully solicited.

It seems to have been overlooked by the State Supreme Court that not all solicitations and displays under a. and b. above resulted in orders or interstate sales; certainly these were definitely local activities.

The Omaha Itinerant Vendors' Ordinance was tailored **not to impinge upon interstate commerce operations alone;** it made no distinction between residents or non-residents, intrastate or interstate operations; it only brought within its compass those transient vendors or merchants who did not have established places of business within the City, which would be otherwise taxed. Consequently, no like, or similar, tax was laid upon other merchants who did have established places of business within Omaha, Nebraska.[7]

In other words, the Ordinance made no distinction between the out-of-state and the in-state merchant. It embraced that large horde of transient merchants like roving photographers, traveling magazine solicitors, roll-

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7 This, accordingly, distinguishes **Best & Co. v. Maxwell,** 311 U. S. 454, 61 S. Ct. 334, 84 L. ed. 275, where the out of town merchant was taxed $250 a year and the local merchant $1.00 a year, resulting in patent discrimination against interstate commerce, or, as expressed in **General Trading Co. v. State Tax Commission of Iowa,** 322 U. S. 335, 64 S. Ct. 1028, 88 L. ed. 1309, concerning **Best & Co. v. Maxwell,** supra, North Carolina had enacted "* * * legislation obviously hostile or practically discriminatory towards interstate commerce."

ing stores, peddlers and other so-called gypsy caravans—to borrow the current phrase—who had become "untouchables" from the taxation standpoint by reason of their roving operations.[8] Neither by words nor by application could the Ordinance be said to rest more heavily on the out-of-state merchant than the in-state merchant practicing the same occupation of an itinerant merchant. No invidious distinctions are carved out by the Ordinance so as to cause impingement only on the out-of-state merchant. We stress this as it seems to have been significantly overlooked by the State Supreme Court.[9]

It was further stipulated (B. of Ex. 23) that the Respondent and other merchandising concerns of like character received, as part of the public services of local government, the police and fire protection and other services furnished by the local government and paid for by the taxpayers of Omaha, Nebraska, including, in part, the retail merchant members of the Interveners, but paid nothing in the way of taxes. By comparison, the retail merchant and furrier members of the Interveners, on an annual business volume aggregating $40,500,000 or an average volume of $3,080 per business day, paid state and local taxes of $507,778 or at the rate of $48 per business day—as compared to the $15 per business day occupation tax, opposed and refused to be paid by the Respondent, where sales during a recent fur salon of a like concern on a two or three-day stand aggregated as much as $50,000 (B. of Ex. 22).

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8 A somewhat parallel Nebraska Statute, affecting itinerant merchants by motor vehicle, likewise distinguishes the "established place of business." Section 60-701, et seq., Rev. Stat. Nebr. 1943.

9 The decision of the State Supreme Court likewise operated to invalidate other like Ordinances of other municipalities in Nebraska, so that the League of Nebraska Municipalities and several City Attorneys, struck with consternation by the decision, appeared by Brief of Amicus Curiae in support of the Motion for Rehearing.

As to the regularity and continuity of the operations of these interstate itinerant merchants—they obtain (through their regular return to the City and their repetitious interim advertising) a concentration during four or five days in the year not attained by the local merchants in weeks or months—simply because they are *not* in Omaha oftener. In other words, they accomplish this by their advertising in advance, the drawing power of their national names, their studied refraining from coming oftener—resulting in customers actually waiting with their orders for their two or three-day stands. This means, then, competition with the local merchants all the time—the year around. They are, accordingly, not mere occasional transients (like Dorothy Nippert); they are as regular—although intermittent—as rain—in Omaha every year, twice a year, two or three days each time, twenty to twenty-five years. In sum, therefore, the local merchants are shouldering the taxes of these non-paying merchants while the latter are competing with the local merchants for the same business—achieving a status of complete tax exemption—of "no tax at all," converting the Interstate Commerce Clause into a Tax Exemption clause (which it distinctly is not); they achieve the tax impregnable position of the mail order establishments and yet partake of the advantages of the local merchants, to-wit, the actual display of goods and personal contact with the customers—seeking the advantages of both the mail order house and the local merchant, but the responsibilities and burdens of neither.

In support of a Motion to Dismiss the Respondent's appeal to the Supreme Court of Nebraska and by way of Plea in Abatement Thereof, it was also shown that on two different occasions, without benefit of supersedeas, the Respondent complied in all respects with the Omaha

Itinerant Vendors' Ordinance, that is to say, on September 30, 1947, with respect to two different hotel stands on the 8th and 9th days of October, 1947, and on the 17th and 18th days of November, 1947, and again on January 23, 1948, with respect to a hotel stand on January 23 and 24, 1948.

IV.

SPECIFICATION OF ERRORS

Embracing all "The Questions Presented," as set out in the foregoing Petition, the Petitioners submit that the Nebraska Supreme Court erred—

a. In holding that the Omaha Itinerant Vendors' Ordinance unlawfully undertook to regulate interstate commerce in violation of the Commerce Clause. U. S. C. A. Const., Art. 1, Section 8.

b. In rejecting a separate suitor interest in the Intervener merchant associations measured by their separate interest in the competitive practices, including the relative tax burdens—or their absence—of competitors, through achieving, by injunction, an exemption and immunity from any tax.

c. In extending an injunctive remedy to Respondent, notwithstanding the adequacy of its legal remedy.

d. In failing to dismiss the appeal of the Respondent to the Nebraska Supreme Court as moot, when in the interval, without benefit of supersedeas, the Respondent fully complied with the Omaha Itinerant Vendors' Ordinance on two different occasions with respect to three different two-day hotel stands.

V.

ARGUMENT

As portraying the incongruity of the decision of the Nebraska Supreme Court with established law as emanating from this Court, particularly in its more recent pronouncements, we here draw attention to a few, as pointing the propriety of an exercise of the discretion of this Honorable Court to grant Certiorari.

Right of Municipalities to Differentiate Itinerant Vendors for Separate Tax and License Treatment

With respect to a situation where "regularly established places of business" were differentiated from the occupation tax applicable to transient dealers, *Singer Sewing Machine Co. v. Brickell*, 233 U. S. 304, 34 S. Ct. 493, 58 L. ed. 974, said:

> "The statute under consideration does not in direct terms or by necessary inference manifest an intent to regulate or burden interstate commerce. Full and fair effect can be given to its provisions, and an unconstitutional meaning can be avoided, by indulging the natural presumption that the legislature was intending to tax only that which it constitutionally might tax.
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> "But there is an evident difference, in the mode of doing business, between the local tradesman and the itinerant dealer, and we are unable to say that the distinction made between them for purposes of taxation is arbitrarily made. In such matters the states necessarily enjoy a wide range of discretion, and it would require a clear case to justify the courts in striking down a law that is uniformly applicable to all persons pursuing a given occupation, on the

ground that persons engaged in other occupations more or less like it ought to be similarly taxed."

* * * * *

"The state has a wide range of discretion with respect to establishing classes for the purpose of imposing revenue taxes, and its laws upon the subject are not to be set aside as discriminatory unless it clearly appears that there is no rational basis for the classification."

Accord, *Robertson v. California*, 328 U. S. 440, 66 S. Ct. 1160, 90 L. ed. 1366, upholding a licensing by the state of the agent of a foreign insurance company, even though local agents were not required to procure such license; and *Prudential Insurance Company v. Benjamin*, 328 U. S. 408, 66 S. Ct. 1142, 90 L. ed. 1342.

In *Caskey Baking Company v. Commonwealth of Virginia*, 313 U. S. 117, 61 S. Ct. 881, 85 L. ed. 1223, this Court likewise said:

"Some occupations may be taxed though others are not. Some may be taxed at one rate, others at a different rate. Classification is not discrimination. It is enough that those in the same class are treated with equality. That is true here."

And an exact apportionment is not requisite, for "rough approximation rather than precision" is sufficient. *International Harvester Co. v. Evatt*, 329 U. S. 416, 67 S. Ct. 444, 91 L. ed. 390.

No Illegal Discrimination in Tax Treatment as Between Local and Non-Local Merchants

The Omaha Ordinance took cognizance of, but the Nebraska Court failed to observe, *Great Atlantic & Pa-*

cific Tea Co. v. Grosjean, 301 U. S. 412, 57 S. Ct. 772, 81 L. ed. 1193, where this Court held:

> "Taxation may be made the implement of exercise of state's police power, and hence proper and reasonable discrimination between classes to promote fair competitive conditions and to equalize economic advantages is lawful."

Interstate Commerce Is Not Immune from Local Taxation

Contrary to the Nebraska Court's pronouncements, this Court in *Nippert v. City of Richmond,* 327 U. S. 416, 66 S. Ct. 586, 90 L. ed. 760, acknowledged that—

> "There is no lack of power in the state or municipalities to see that interstate commerce bears with local trade its fair share of the cost of local government, more especially in view of recent trends in this field."

So, in *Freeman v. Hewit,* 329 U. S. 249, 67 S. Ct. 274, 91 L. ed. 265, the opinion adverts to a "justified" state taxation falling on interstate commerce when—

> "* * * designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys."
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> * * * * *
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> "* * * As a practical matter it (the State) can make such commerce pay its way, as the phrase runs, apart from taxing the very sale."

The concurring opinion in that case likewise states:

> "The commerce clause was not designed or intended to outlaw all state taxes bearing 'directly' on interstate commerce. Its design was only to exclude those having the effects to block or impede it which called it and the Constitution itself into being. *Not*

all state taxes, nor indeed all *direct state taxes, can be said to produce those effects.*" (Emphasis in part supplied.)

* * * * *

"This Court has gone far in sustaining state taxes laid upon local incidents of interstate transactions by both of the state of origin and the state of the market in recent years. Perhaps it may be said, in view of such decisions, that it has more clearly sustained such taxes at the marketing end than by the state of origin, although this may be a matter of debate."

* * * * *

"*The trend of recent decisions has been toward sustaining state taxes formerly regarded as outlawed by the commerce clause.*" (Emphasis supplied.)

In *Richfield Oil Corp. v. State Board of Equalization,* 329 U. S. 69, 67 S. Ct. 156, 91 L. ed. 80, this Court said:

"Moreover, the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce."

* * * * *

"But the scope of the limitation has been determined by the Court in an effort to maintain an area of trade free from state interference and at the same time to make interstate commerce pay its way."

In another case, which is still in the process of reviewing this problem (a phase of which was decided by the Supreme Court of Errors of Connecticut on July 21, 1948, after a remand from this Honorable Court in *Spector Motor Service, Inc., v. McLaughlin,* 323 U. S. 101, 65 S. Ct. 152, 89 L. ed. 101, returning the case to the Circuit Court of Appeals, until state constitutional aspects had first been determined by the Courts of Connecticut), the

Circuit Court of Appeals has said in *Spector Motor Service, Inc., v. Walsh* (C. C. A. 2), 139 F. (2d) 809:

> "The traditional dogma is that a state cannot tax interstate commerce, the business which constitutes such commerce, or the privilege of engaging in it."
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> * * * * *
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> "In the past years, however, many exceptions have served increasingly to limit this strict rule."
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> * * * * *
>
> "The trend is away from the automatic condemnation of taxes by formal, preconceived and antiquated rules. As was said in Wisconsin v. J. C. Penney Co., 311 U. S. 435, 445, 61 S. Ct. 246, 250, 85 L. ed. 267, 130 A. L. R. 1229: 'We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize.'"
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> * * * * *
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> "Indeed, if we should strike down the tax against plaintiff, we would be discriminating against intrastate business, which would still have its burdens to pay under the tax and which is just as much entitled to constitutional protection from discrimination as interstate commerce, as the dissents of Mr. Justice Brandeis and Mr. Justice Black, cited above, in particular have pointed out. As a matter of fact, such an action by us would mean that a corporation which does a vast business within the state will escape completely from contributing to the expenses of the state."

That far-reaching decision, as to which Certiorari was granted by this Honorable Court, expresses other considerations favoring the exercise of the City of Omaha's

taxing and police powers, and, as indicated, the views expressed therein were not rejected by this Honorable Court, but the case was merely remanded for settlement of state questions now recently settled favorably to the State. *Spector Motor Service, Inc., v. Walsh,* 135 Conn. 37, 61 Atl. (2d) 89. See, also, *West Publishing Company v. McColgan,* 27 Cal. (2d) 705, 166 Pac. (2d) 861, aff'd per curiam 328 U. S. 823, 66 S. Ct. 1378, 90 L. ed. 1603.

Taxation as a Measure of Compensation for Public Services

The Nebraska Court seemed to regard the instant occupation tax as vindictively applied to stifle interstate commerce. Such, however, is not the nature of taxation for as stated in *Welch v. Henry,* 305 U. S. 134, 59 S. Ct. 121, 83 L. ed. 87:

> " 'Taxation' is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract, but it is a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens."

And in *Ford Motor Co. v. Beauchamp,* 308 U. S. 311, 60 S. Ct. 273, 84 L. ed. 304, this Court likewise said:

> "The exploitation by foreign corporations of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations. In laying a local privilege tax, the state sovereignty may place a charge upon that privilege for the protection afforded."

Accord, *Caskey Baking Company v. Commonwealth of Virginia,* 313 U. S. 117, 61 S. Ct. 881, 85 L. ed. 1223.

Extent of Trend Away from the "Drummer" Cases Doctrine

The Nebraska Court applied *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 75 S. Ct. 592, 30 L. ed. 694, in all its pristine vigor, in disposing of the instant case, quoting as current law the following therefrom:

> "Interstate commerce cannot be taxed at all by a state, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state."

and turned a blind eye on more recent cases.

But the foregoing is not current law, for in *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 68 S. Ct. 1475, 92 L. ed. (adv. ops.) 1409, decided June 21, 1948, this Honorable Court upheld a state franchise tax upon a wholly interstate commerce operation with respect to compensation for public services afforded local activities incident to such interstate commerce, and said in the prevailing opinion:

> "We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

And in a concurring opinion, it was added:

> "But they (the local activities) are incidents of carrying on that business taking place in Mississippi and only there, for which Mississippi affords protec-

> tion received from no other state or the United States. Nor can any other state give that protection. For that portion of the business and the protection given it, I think the state is entitled to levy such a tax as has been placed here. Nothing in the commerce clause or its great purposes forbids such an exaction."[10]

And as indicating that the case of *Memphis Natural Gas Company v. Stone*, supra, is a milestone decision illustrating

> "the increasing reluctance of the Court to thwart the States in meeting modern economic conditions (which) should result in broadening the power of the states to tax business carried on across state lines,"

an article on "State Franchise Taxation of Interstate Businesses" by Hellerstein in the November, 1948 issue, Volume 4, No. 1, p. 95, of Tax Law Review discusses *Memphis Natural Gas Co. v. Stone*, supra, at length. As background, the commentator points out:

> "Increasingly, it became apparent that the Court was the prisoner of a piece of conceptualism, the victim of a doctrine which had little bearing on the economic facts of life or the revenue needs of the states. In the meantime, the states' revenues suffered and local businessmen were discriminated against by the

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10 The acknowledgment of the trend is signalized in many contemporary Law Journals. See "State Tax Barriers to Interstate Trade", 53 Harvard Law Review, pp. 1253, 1255, 1258 and 1260; "Jurisdictional and Interstate Commerce Problems in the Imposition of Excise on Sales", 8 Law and Contemporary Problems 482; "Taxation—State Gross Receipts Tax—Receipts from Interstate Sale of Securities Not Taxable", Chicago Law Review, 503; "Constitutional Law—State Taxation of Interstate Commerce", 44 Michigan Law Review 1135; and "State Taxation of Interstate Commerce", 36 Illinois Law Review, 737.

> immunity of their larger and more powerful competitors from numerous state levies." (p. 101)

and concludes:

> "These are fiscal problems of great importance to the revenues of the state, to the competitive position of local and interstate business, and to the development of the American economy. They should not turn on 'dialectics' but on 'business realities' and a practical consideration of the public fisc upon which they have their impact." (p. 114)

License Tax Applicable to Interstate Commerce Not Invalid

The opinion of the Nebraska Court seems to consider as in a separate offending category a fixed sum license tax, but it failed to mention *Independent Warehouses, Inc., v. Scheele*, 331 U. S. 70, 67 S. Ct. 1062, 91 L. ed. 1346, upholding a license tax imposed by a township ordinance on storage of goods in the course of interstate commerce, where this Court said:

> "It follows that the tax is not forbidden because it is part of a licensing measure. Even where it is undisputed that the commerce is exclusively interstate in nature, 'not the mere fact or form of licensing, but what the license stands for by way of regulation is important.' Robertson v. California, 328 U. S. 440, 458, 90 L. ed. 1366, 1373, 66 S. Ct. 1160. See also Union Brokerage Co. v. Jensen, 322 U. S. 202, 88 L. ed. 1227, 64 S. Ct. 967, 152 A. L. R. 1072; Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17, 78 L. ed. 622, 54 S. Ct. 267. Nor does anything in the Interstate Commerce Act forbid local taxation where it is otherwise permissible. The tax therefore is valid under the commerce clause."

Accord, *Kehrer v. Stewart*, 197 U. S. 60, 25 S. Ct. 403,

49 L. ed. 663, and *Wiggins Ferry Co. v. City of East St. Louis*, 107 U. S. 365, 2 S. Ct. 257, 27 L. ed. 419.

Only Undue or Discriminatory Burden Forbidden

As stated in *Nippert v. City of Richmond*, 327 U. S. 416, 66 S. Ct. 586, 90 L. ed. 760:

> "As has been so often stated but nevertheless seems to require constant repetition, not all burdens upon commerce, but only undue or discriminatory ones, are forbidden."

Accord, *Postal Telegraph Co. v. Richmond*, 249 U. S. 252, 63 L. ed. 590, 39 S. Ct. 265; *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 82 L. ed. 823, 58 S. Ct. 546; *McGoldrick v. Berwind-White Coal Mining Company*, 309 U. S. 33, 60 S. Ct. 388, 84 L. ed. 536; and *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, 61 S. Ct. 586, 85 L. ed. 888.

State and Municipal Power to Regulate Interstate Commerce for Local Purposes

Panhandle Eastern Pipe Line Co. v. Public Service Commission, 322 U. S. 507, 68 S. Ct. 190, 92 L. ed. (adv. ops.) 173, upheld the exercise by a state of power to regulate interstate commerce, where such power exists, and said:

> "It is the power to require that it be done on terms reasonably related to the necessity for protecting the local interests on which the power rests."

Accord, *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 68 S. Ct. 358, 92 L. ed. (adv. ops.) 339, and *Robertson v. California*, supra, and *Prudential Insurance Company v. Benjamin*, supra.

Similarly, in *Eichholz v. Public Service Commission,* 306 U. S. 268, 59 S. Ct. 532, 83 L. ed. 641, it was held:

> "In the absence of the exercise of Federal authority over interstate commerce, and in the light of local exigencies, a state is free to act in order to protect its legitimate interests in the regulation of intrastate commerce even though interstate commerce is directly affected thereby."

Tax Exemption or Immunity Jealously Regarded

In *Stone v. Interstate Natural Gas Co.* (C. C. A. 5), 103 F. (2d) 544, aff'd per curiam, 308 U. S. 522, 60 S. Ct. 292, 84 L. ed. 442,—and followed with approval in *Memphis Natural Gas Co. v. Stone,* supra,—the Court said:

> "Any immunity from general taxation appears more and more inconvenient and unjust. The recent reexamination of the basis for such immunities has resulted in an upheaval. The current of authority has been turned."
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> * * * * *
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> "A basic principle is that taxation is vital both to the State and National governments; to be concurrently exercised by both with as little interference as possible by one with the other. Another basic principle is that immunity from taxation ought to be jealously regarded."
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> * * * * *
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> "An implication of immunity based on constitutional provisions ought to be a necessary implication, and to extend no further than the necessity requires; and this especially when the immunity is invoked not in behalf of a government but of a citizen or private corporation. It is clear also that because a matter is regulable only by one government it is not thereby exempted from just taxation by the other."
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> * * * * *

> "Conversely, the clause of the federal Constitution vesting exclusive power to regulate interstate and foreign commerce in Congress ought not of itself to exempt such commerce and those who carry it on in a State from a decent and non-discriminatory State taxation."

Burden Too Slight to Result in Invalidation of Tax

The tax upheld in *Memphis Natural Gas Co. v. Stone*, supra, was $3,400.00 and was not regarded as excessive. In *Aero Mayflower Transit Company v. Board of R. R. Commissioners*, 332 U. S. 495, 68 S. Ct. 167, 92 L. ed. (adv. ops.) 153, a tax against motor carriers engaged exclusively in interstate commerce amounted to $10.00 per vehicle, plus a fee of one-half of one per cent of the gross operating revenue, with an annual minimum requirement of $15.00 per vehicle. Sustaining the impost on the now oft-expressed concept of payment of a fair share of the cost of local government, the Court added in the opinion:

> "And, as we have said, the aggregate amount of both taxes combined is less than that of taxes heretofore sustained. In view of these facts there is not even semblance of substance to appellant's contention that the taxes are excessive."

Accord, *Aero Mayflower Transit Company v. Georgia Public Service Commission*, 295 U. S. 285, 55 S. Ct. 709, 79 L. ed. 1439.

Precedents for Validity of Occupation Tax

That occupation taxes are a common and acknowledged mode of realizing tax revenues is evident from many cases, including *American Manufacturing Co. v. St. Louis*, 250 U. S. 459, 39 S. Ct. 522, 63 L. ed. 1084, agreed upon in the majority and minority opinions in *Joseph v.*

Carter & Weekes Stevedoring Company, 330 U. S. 422, 67 S. Ct. 815, 91 L. ed. 993, as reflecting current law. That earlier decision upheld a municipal occupation tax upon a manufacturing operation even though all the goods manufactured were for interstate disposition.

Accord, *United States Glue Co. v. Oak Creek,* 247 U. S. 321, 38 S. Ct. 499, 62 L. ed. 1135; *Department of Treasury v. Wood Preserving Corp.,* 313 U. S. 62, 61 S. Ct. 885, 85 L. ed. 1188; *Department of Treasury v. Ingram-Richardson Mfg. Co.,* 313 U. S. 252, 61 S. Ct. 866, 85 L. ed. 1313; *Aponaug Mfg. Co. v. Stone,* 314 U. S. 577, 62 S. Ct. 131, 86 L. ed. 467, aff'g per curiam 190 Miss. 805, 1 So. (2d) 763; and *Wiggins Ferry Co. v. City of East St. Louis,* 107 U. S. 365, 2 S. Ct. 257, 27 L. ed. 419.

And in *Stone v. Interstate Natural Gas Co.* (C. C. A. 5), 103 F. (2d) 544, aff'g per curiam, 308 U. S. 522, 60 S. Ct. 292, 84 L. ed. 442—and which case was followed with approval in *Memphis Natural Gas Co. v. Stone,* supra —the Court said in the opinion:

> "And interstate carriers and merchants must pay general property taxes for State protection to their property in the State. Now when such property taxes prove insufficient to support the State government which protects their business as well as their property, why should not general taxes in other forms be shared by them, where not expressly prohibited by the Constitution?"

Separate Suitor Interest of Interveners

It is implicit in *Great Atlantic & Pacific Tea Co. v. Grosjean,* 301 U. S. 412, 57 S. Ct. 772, 81 L. ed. 1193, that an effort by the Respondent and other like merchandising concerns, to carve out through litigation an island of im-

munity from taxation, affects competitive methods of competitors, for there the Court held:

> "Taxation may be made the implement of exercise of state's police power, and hence proper and reasonable discrimination between classes to promote fair competitive conditions and to equalize economic advantages is lawful."

In *Freeman v. Hewit,* supra, the concurring opinion likewise acknowledged that—

> "local trade was then placed at a disadvantage with interstate trade, and the Commerce Clause thereby became a refuge for tax exemption, not simply a means of protection against unequal or undue taxation."

These partial references sufficiently illustrate that litigation of this character draws into the arena, not merely the question of a return of tax revenues to the municipality, but the question of the equipoise—or its disturbance—as between competing local and interstate merchants.[11]

Injunction Not Available to Restrain Criminal Prosecutions

That Courts of Equity do not ordinarily restrain criminal prosecutions, even though unauthorized and hence unlawful, when the issue of lawfulness may be tested in either criminal or other proceedings, is evident from *Beal, County Attorney, v. Missouri Pacific Railroad Corp.,* 312 U. S. 45, 85 L. ed. 577, 61 S. Ct. 418.

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11 That equally important interests of local merchants are discriminated against by the tax exemption of their untaxed competitors is also noted in the foregoing contemporary Law Journals. 53 Harvard Law Review 1253; 8 Law and Contemporary Problems 482; and 36 Illinois Law Review 727.

Appeal Becomes Moot Where Respondent in Interim Complied with Allegedly Offending Ordinance

Under parallel circumstances, an appeal was dismissed as moot in *Singer Manufacturing Company v. Wright,* 141 U. S. 696, 12 S. Ct. 103, 35 L. ed. 906.

Accord, *Little v. Bowers,* 134 U. S. 547, 10 S. Ct. 620, 33 L. ed. 1016; *San Mateo County v. Southern Pacific R. R. Company,* 116 U. S. 138, 6 S. Ct. 317, 29 L. ed. 589; *State of California v. San Pablo & Tulare R. Co.,* 149 U. S. 308, 13 S. Ct. 876, 37 L. ed. 747, and *Addington v. Burke,* 125 U. S. 696, 8 S. Ct. 1391, 31 L. ed. 853.

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CONCLUSION

We respectfully submit that the case presents an important question of Federal law and of wide public interest which, accordingly, should be decided by this Honorable Court. The wide swing in doctrinaire concepts—ranging from the former absolute bar of local taxation of interstate commerce under the now outmoded "Drummer" cases to the present permissible local taxation of local aspects of interstate commerce in an effort measurably to recompense states and municipalities for the services of local government—requires that the decision of the Nebraska Supreme Court—adhering slavishly to the former concept—should be reviewed and re-examined. Certainly, the decision of the Nebraska Supreme Court, under visé herein, was outmoded the minute it was rendered, especially in the light of the contemporaneous decision of this Honorable Court in *Memphis Natural Gas Co. v. Stone,* supra, and the prior decision of *Independent Warehouses, Inc., v. Scheele,* supra, neither of which significant

decisions, sustaining state taxation of interstate commerce, the State Supreme Court even mentioned.

We accordingly submit that Certiorari should be granted that the decision of the Nebraska Supreme Court may be reversed and corrected.

Respectfully submitted,

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APPENDIX

Ordinances Involved

The portions of Chapter 22, Article I, of Ordinance No. 14924, pertinent to this case, follow:

22-1.1. ITINERANT VENDORS, PERMITS, OCCUPATION TAX, PENALTIES. That the term "Person," as herein used, shall and does include persons, corporations, partnerships, or associations of persons, real or artificial.

That the term "Itinerant vendor" for the uses and purposes of this Article is defined to be any person, either as principal, agent or employee, who does not intend to conduct his business in the City of Omaha for a period of longer than one hundred twenty days, or who does not maintain a regular place of business in Omaha for the conduct of retail trade; and who locates in a store, building, or place of business, or a hotel room, or who goes about from house to house or office to office, or solicits by mail, advertising, dodgers, circulars, telephone or other method; and who offers for sale, barter, auction, trade or exchange, or sells or takes orders for, goods, wares, or merchandise, or issues or distributes coupons, certificates or other writings which entitle the holder thereof to any goods, wares or merchandise at retail, or which entitle the holder to acquire same upon any condition.

It is hereby made unlawful for an itinerant vendor as herein defined, to carry on or offer to carry on, the character of business above defined, and to sell or offer to sell by any of the means above set out, or in the manner above set out, any goods, wares, or merchandise or coupons, certificates or writings, entitling purchasers or holders thereof as above specified without first having procured a permit from the City so to do.

Any person desiring a permit to carry on the character of business above defined, shall make an application therefor in writing to the City Council of the City of Omaha, said application to state the name, age and residence of the applicant, whether the applicant is acting on behalf of a corporation, partnership or individual, the address of the principal officer of such corporation, partnership or individual; the address of the local headquarters or place in the City of Omaha from which such business is to be conducted, the period during which such business is to be carried on; a description of the goods, wares or merchandise handled by the applicant, and the name and address of each local agent or solicitor employed or to be employed, by such applicant, in connection with such business. Such application shall be presented to the City Council at its next regular meeting, when a date for hearing thereon shall be designated, which date shall be not less than five days nor more than fifteen days from the date of presentation of the application to the Council. At such hearing the City Council shall inquire into the character of the applicant and of the solicitors or agents named by him and into the character of the goods, wares and merchandise to be handled, and if the Council shall find that said applicant or his agents, or any of his agents or solicitors are not persons of good character, or that the goods, wares and merchandise to be handled or the method of handling same are involved in misrepresentation or dishonesty, the said application shall be denied, and if it is not so found, said application shall be granted. Upon approval thereof by the City Council, the permit provided for herein shall be issued by the City Clerk, and state therein the date issued, person to whom issued, kind and character of business and the place where such business is to be carried on and the period during which said permit shall be in force, which shall not be more than one hundred twenty days from the date of issue. The permit when so issued shall entitle the

itinerant vendor to conduct for a period of time not longer than one hundred twenty days from the date of issue, the business of selling or offering for sale, goods, wares and merchandise as described in the application and permit, or coupons, certificates or writings entitling holders or purchasers thereof to any character of goods, wares or merchandise of any legal kind and character as may be described in the permit, and at the place designated thereon, but the conduct thereof shall be subject to all reasonable rules and regulations and ordinances of the City as respects place of sale and manner of sale as well as the conduct and carrying on of such business. Each salesman or solicitor designated in the application of his or her employer, as provided in this Section, shall personally appear before the City Clerk of the City of Omaha and upon payment of a fee of One Dollar ($1.00) each shall receive a permit to act as such salesman, agent or solicitor, which permit must be endorsed by him or her in the presence of the City Clerk prior to issuance. If after having granted a permit the City Council shall have reason to believe that the person to whom the permit has been issued, or his agents and solicitors are conducting thereunder a business which is not as described in the application and permit, or are conducting the same in an illegal manner or by misrepresentation or fraud, said applicant shall be summoned to appear before the City Council at any time set by said body, for a hearing to show cause why said permit should not be cancelled, and if the City Council shall find that applicant is so conducting his business, the permit shall be cancelled.

There is hereby levied and imposed an Occupation Tax of Fifteen Dollars ($15.00) per day upon the business of Itinerant Vendor, which tax so levied and imposed shall become due and payable each day in advance. The Occupation Tax so levied may be collected by either distress and sale of the personal property of the person owing such tax, or by suit

in any court of competent jurisdiction to recover the amount thereof. Failure to pay such tax when due or to provide the bond hereby required, shall cause the revocation of the permit by the City Clerk without notice and any person who shall refuse or neglect to pay the tax when due shall be liable to a fine of not less than Five Dollars ($5.00) nor more than Fifty Dollars ($50.00), and the Court may commit to the City Jail any person or persons against whom such fine shall be assessed until the fine shall be paid or otherwise satisfied.

* * * * *

22-1.5. PERMIT REVOKED; PENALTIES. (a) Any holder of permit hereunder convicted in a court of competent jurisdiction of fraud, imposition, misrepresentation, cheating or sharp practice shall have his permit forthwith revoked by the City Clerk and shall not be entitled to receive another permit to peddle in and through the streets and may be fined in any sum not less than Five Dollars ($5.00) for each offense.

(b) Failure to obtain a permit for the uses and purposes as set out in Section 22-1.1 of this Article shall constitute a misdemeanor and upon conviction thereof the offender shall be fined in a sum not exceeding One Hundred Dollars ($100.00) or imprisoned not exceeding ninety days.

Ordinance No. 15524

AN ORDINANCE to amend Chapter 22, Article 1 of Ordinance No. 14924, by adding thereto two sections to be designated Section 22-1.6 and 22-1.7, providing for the furnishing of a surety bond and health certificates by itinerant vendors and by amending Section 22-1.6 to provide penalties for the violation of said Article 1 as amended.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF OMAHA:

Section 1. That Chapter 22, Article 1 of Ordinance No. 14924, be, and the same hereby is, amended by the addition thereto of the following section:

22-1.6. SURETY BONDS REQUIRED. Every itinerant vendor operating within the City of Omaha, in addition to the license fee herein specified, shall deposit with the city clerk a surety bond in the sum of not less than Five Thousand Dollars ($5,000.00), executed by a surety company authorized to do business in the State of Nebraska, conditioned upon the faithful compliance by the licensee, his servants, and agents, with the terms and requirements of this ordinance and also conditioned to indemnify any purchaser of goods, wares, or merchandise from the licensee, his servants, or agents against loss or damage by reason of misrepresentation as to the kind, quality, or value of the said goods, wares, or merchandise. The term of the said bond shall be at least one year from the date of filing the same with the city clerk, and the bond shall designate one or more local officers of the surety company as agents for service of process upon the licensee in any law suit arising out of any sale of such goods, wares, or merchandise.

Section 2. That Chapter 22, Article 1 of Ordinance No. 14924, be, and the same hereby is, amended by the addition thereto to the following section:

22-1.7. *Health Certificates Required.* Before any license shall be issued hereunder, every itinerant vendor shall furnish, as a part of his application for such license, a health certificate by a duly licensed physician licensed to practice as such physician within the State of Nebraska, certifying that the licensee and all employees connected with such business are free from any contagious or infectious disease.

Section 3. That Section 22-1.5 of Ordinance No. 14924, which now reads as follows:

22-1.5. PERMIT REVOKED; PENALTIES. (a) Any holder of permit hereunder convicted in a court of competent jurisdiction of fraud, imposition, misrepresentation, cheating or sharp practice shall have his permit forthwith revoked by the City Clerk and shall not be entitled to receive another permit to peddle in and through the streets and may be fined in any sum not less than Five Dollars ($5.00) nor more than Fifty Dollars ($50.00) for each offense.

(b) Failure to obtain a permit for the uses and purposes as set out in Section 22-1.1 of this Article shall constitute a misdemeanor and upon conviction thereof the offender shall be fined in a sum not exceeding One Hundred Dollars ($100.00) or imprisoned not exceeding ninety days.

shall be amended to read as follows:

22-1.5 PERMIT REVOKED; PENALTIES. (a) Any holder of permit hereunder convicted in a court of competent jurisdiction of fraud, imposition, misrepresentation, cheating or sharp practice shall have his permit forthwith revoked by the City Clerk and shall not be entitled to receive another permit to peddle in and through the streets and may be fined in any sum not less than Five Dollars ($5.00) nor more than Fifty Dollars ($50.00) for each offense.

(b) Failure to obtain a permit for the uses and purposes as set out in Section 22-1.1 of this Article or failure to furnish the surety bond as required by Section 22-1.6 of this Article or failure to furnish the health certificates required by Section 22-1.7 of this Article shall constitute misdemeanors and upon conviction the offender shall be fined in a sum not exceeding One Hundred Dollars ($100.00) or imprisoned not exceeding ninety days for each offense.

Section 4. This Ordinance shall be in full force and effect from and after fifteen (15) days after its passage.

Passed: Sept. 3, 1946.

C. W. LEEMAN,
Mayor and President of City Council.

Introduced by Commissioner:
HARRY TRUSTIN.

Attest:

M. J. DINEEN, JR.,
City Clerk.

Approved as to Form:

.....
City Attorney.

MAR 5 1949
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1948

No. 507

CITY OF OMAHA, a Municipal Corporation, CHARLES W. LEEMAN, Mayor, PAUL HAZE, Chief of Police, et al.,

Petitioners,

vs.

FRANK BROTHERS FOOTWEAR, INC.,

Respondent.

BRIEF ON BEHALF OF BEST & CO., INC., AS *AMICUS CURIAE*, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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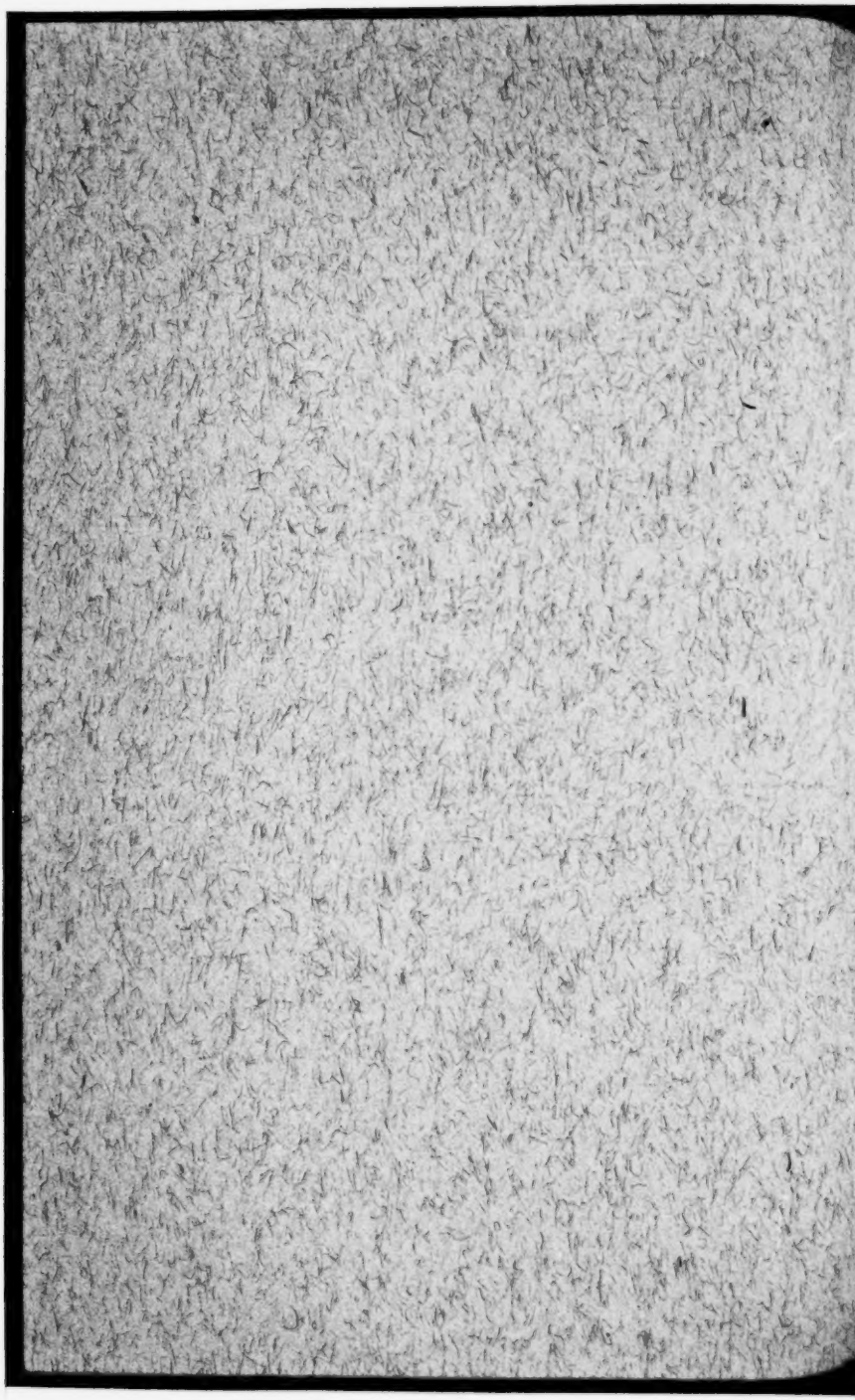

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Supreme Court of the United States

OCTOBER TERM, 1948

No. 507

CITY OF OMAHA, a Municipal Corporation, CHARLES W. LEEMAN, Mayor, PAUL HAZE, Chief of Police, et al.,
Petitioners,

vs.

FRANK BROTHERS FOOTWEAR, INC.,
Respondent.

BRIEF ON BEHALF OF BEST & CO., INC., AS *AMICUS CURIAE*, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI [1]

Opinions of the Courts Below

The opinion delivered in the Supreme Court of Nebraska is reported in 149 Neb. 888, 33 N. W. (2d) 161. It consists only of a statement that "This case is controlled by Best & Co., Inc. v. City of Omaha" (R. 94), which latter decision (R. 77-94) was concurrently rendered and is reported in 149 Neb. 868, 33 N. W. (2d) 150. The plaintiff therein is the *amicus curiae* herein.

There was no dissent from either opinion.

A motion for rehearing was denied without opinion (R. 95-98).

In the District Court of Douglas County, the court of first instance, no opinion was delivered. (The decree of that Court appears at R. 38-41.)

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[1] The written consent of all parties to the case to the filing of this brief has been filed herein, pursuant to Rule 27 (9).

Jurisdiction

The validity of certain ordinances of the City of Omaha relating to "itinerant merchants" is drawn in question by the final decree of the Court below on the ground of their being repugnant to the Constitution of the United States, and the decision is against their validity. The petitioners now apply for a writ of certiorari pursuant to Title 28, U. S. C., 1948 ed., § 1257.

Statement of the Case

The Nature of the Challenged Ordinances [2]

Solely because respondent "does not intend to conduct (its) business in the City of Omaha for a period of longer than one hundred twenty days" and "does not maintain a regular place of business in Omaha for the conduct of retail trade" it is required by the ordinances, in order to display samples in a hotel room or elsewhere for the sole purpose of securing orders (concededly in furtherance of interstate sales at retail), to comply with the following:

1. Apply in writing for a license to the City Council, which shall conduct a "hearing thereon" in order to "inquire into the character of the applicant and of the solicitors or agents named by him and into the character of the goods, wares and merchandise to be handled";

2. If such approval is obtained, to have each solicitor "personally appear" before the City Clerk;

3. Pay a fixed-sum "occupation tax" of $15 a day;

4. Pay a license fee of $1 for each solicitor;

[2] The ordinances are set forth at R. 6-15.

5. Deposit a surety bond in the sum of $5,000, "conditioned to indemnify any purchaser * * * against loss or damage by reason of misrepresentation as to the kind, quality, or value of the said goods, wares, or merchandise";

6. Furnish "a health certificate by a * * * physician licensed to practice * * * within the state of Nebraska, certifying that the licensee and all employees connected with such business are free from any contagious or infectious disease".

Local retail merchants are subject to neither an occupation tax (in a fixed sum or otherwise), nor any license, health, or surety bond requirements for the privilege of, or as a condition precedent to, their displaying samples or effecting sales.

The Facts [3]

Respondent, a New York corporation, is engaged in the retail sale of shoes. It has no store or other place of business, officer or agent in Omaha or anywhere else in the State of Nebraska and it is not domesticated in that State (R. 66-67).

It rented a room in a hotel in Omaha, where for a period of two days it displayed samples of some of its merchandise to prospective customers, who were local residents invited by notices previously mailed from respondent's New York office. The articles on display were merely samples, which were exhibited to obtain orders for goods corresponding to the samples for future shipment in interstate commerce. No merchandise was sold or delivered, and none was offered or available for that purpose (R. 67-68).

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[3] The case was tried on an agreed statement (R. 79); the stipulations of fact appear at R. 65-75.

The orders were taken subject to acceptance or rejection at respondent's office in New York, to which point all orders were forwarded. Those which were accepted were filled by shipment of the merchandise from New York direct to the customers by mail or through other regular channels of interstate commerce. The orders required and contemplated interstate deliveries for their fulfillment. No merchandise was sent to respondent's representative who conducted the display, and in no instance did he make, handle, or aid the delivery thereof to the customer (R. 68).

No payment or deposit on account of the purchase price was made or received at the time of the display. Invoices were sent from New York direct to the customers, who remitted payments to respondent's New York office (R. 68).

It is undisputed that the respondent's activities in Omaha were directed solely to the solicitation of orders for the purchase of goods to be shipped interstate, and that only interstate sales resulted therefrom.

That the merchandise is a legitimate subject of interstate commerce sales is also conceded.

The ordinances provide that it is unlawful to engage in any activities for which a license is required without first obtaining a license, and impose criminal penalties for a violation thereof (R. 6-9, 13, 14).

The defendants threatened that, if respondent attempted to display its samples again in Omaha, its representative would be criminally prosecuted (R. 20, 68).

Respondent thereupon brought suit to enjoin enforcement of the ordinances against it on the ground that they were repugnant to the Commerce Clause and other provisions of the Constitution of the United States (R. 1-6; 67).

The Trial Court dismissed the complaint (R. 38-41).

The Supreme Court of Nebraska unanimously reversed the decree (R. 77-94), and denied a motion for rehearing (R. 95-98).

Respondent Solicits Orders in Omaha Infrequently, and Not Continuously and Regularly

The undisputed facts, as found by the Court below, are as follows:

> "Such displays have occurred only infrequently, never more than two in any one year, and never for a longer period of time than two days on any one occasion" (R. 82).[4]

There is nothing in the record to support petitioners' assertion that the sample displays and solicitation of orders in Omaha occur with "regularity and continuity" (Br., p. 20). On the contrary, the representative of respondent who conducts its exhibits there is a New York resident (R. 48, 57), and he is not regularly engaged in solicitation in Omaha. The evidence is not even that he conducts exhibits there twice a year or even every year. It is that he "never" held "more" than two exhibits in Omaha in any year and that "never" did any exhibit last longer than two days. That is the maximum.

Irrespective of the yardstick used, respondent's activities in Omaha are not continuous and regular throughout the year, but are limited in frequency and duration, and are casual and spasmodic.

Discriminatory Aspects of the Ordinances

To a large degree, petitioners have jerry-built their case upon an assumption (and it is nothing more substantial than an assumption) that the decision of the Court below affords respondent tax exemption not enjoyed by resident retail merchants of Omaha and that it deprives the municipality of sorely needed revenue (Pet. and Br., pp. 3-4, 11-12, 19).

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[4] The stipulation of facts actually goes beyond the finding of the Court; it reads: "Such displays have never been held regularly or continuously in Omaha by the plaintiff, but occur only infrequently, never more than twice in any one year and never for a longer period than two days on any one occasion" (R. 68; see also R. 71).

The facts are diametrically the opposite.

Regular retail merchants in Omaha, including those who compete with respondent for the sale of similar merchandise, are expressly exempted from the application and reach of the ordinances. (Each member of the intervening associations comes within that specially privileged category (R. 72, 73).) They are subject to *no* occupation tax, and to *no* license, surety bond, or health requirements (R. 65, 68-69).

They do not pay any sales, use, income, or other similar taxes. They pay only real property taxes on their stores, if they own them, and personal property taxes on their stocks of goods. The imposing amount of taxes stated by petitioners to have been paid by the members of the intervening associations (Br., p. 19) represent only property taxes on what they own. It contains no tax for the privilege of soliciting orders or of making sales. Consequently their argument that the ordinances only tend to equalize the tax burdens as between resident and non-resident merchants is specious. What they overlook is that extra-state merchants must pay those same property taxes if they own real or personal property in Omaha on the assessment date (R. 65-66, 74), and that respondent is also subject to property, franchise, and many other taxes in its home State of New York (R. 66).

If Omaha needs taxes (there is no proof of it in the record and, in any event, its need for revenue is not in issue), why does it not extend the ordinances to cover its regular retail merchants and impose upon them license or privilege taxes similar to those it seeks to exact from respondent.

Moreover, the City of Omaha does not exact any taxes from the other tenants (permanent and transient, business and private) of the hotel in Omaha in which respondent conducts its occasional exhibit there. So far as the other tenants are concerned, the City takes the position that the taxes paid by the owner of the hotel cover all municipal

services and facilities afforded the property, irrespective of the character of its occupancy.

As for the provisions of the ordinances that are not productive of taxes, they serve no purpose save to place traps, inconveniences and red tape in the way of out-of-state merchants to discourage them from sending "drummers" to Omaha. For example, after the City Council has conducted an investigation, held a hearing, and approved the application for license, the applicant must still make a personal appearance before the City Clerk to get the license. And no application will be entertained by the City Council unless accompanied by a health certificate issued by a local physician. This means that before an exhibit can be held, an applicant must personally go in advance to Nebraska to submit to a physical examination, then make the application to the City Council, which does not act thereon until five to fifteen days later (R. 7), then appear in person or be otherwise represented before the Council at its hearing (R. 7-8), and finally, upon obtaining the Council's approval, attend again before the City Clerk.

Significantly, these so-called "police" provisions, allegedly designed to "protect" the people of Omaha, do not contain any similar protective measures in respect of local merchants, irrespective of their state of health and that of their employees, irrespective of their financial responsibility or lack of it, and irrespective of their character, the nature of their merchandise, or their selling methods.

Summary of the Holding of the Court Below

The gist of the Court's opinion on the merits is, in its own language, as follows:

> "A review of the stipulated facts in the instant case shows that the appellants' activities in the city of Omaha were confined exclusively to soliciting orders for the sale of goods in another state which contemplated and necessarily required interstate shipment for their fulfillment. They constituted an integral part of interstate commerce and not a local or intra-

state act separable therefrom and subject to taxation or licensing by the city of Omaha, especially as provided for by the ordinances in question" (R. 93-94).

"The ordinances are discriminatory and unreasonable, in violation of the commerce clause of the Constitution of the United States which prohibits discriminatory regulation of interstate commerce, whatever may be its form or method. The ordinances challenged in this case are a clear attempt to regulate interstate commerce" (R. 93).

Summary of Argument

The ordinances contravene the Commerce Clause. This Court has stricken down all State and municipal legislation that has come before it that endeavored to impose, as here, a burdensome and discriminatory fixed-sum tax on the solicitation of orders for the purchase of goods to be shipped interstate. Directly arrayed against the position of the petitioners herein is an unbroken line of decisions extending over a period of more than half a century, starting with *Robbins* v. *Shelby Taxing District,* 120 U. S. 489 (decided in 1886), and continuing right up to the present time with *Best & Co.* v. *Maxwell,* 311 U. S. 454 (decided in 1940), and *Nippert* v. *Richmond,* 327 U. S. 416 (decided in 1946). The *Best & Co.* case is in all material respects identical with the instant case, and the attempted distinction sought to be drawn by petitioners is inaccurate and ineffectual (Points I and II).

The decisions upon which petitioners base their argument that the "drummer cases" are outmoded and no longer the law as applied to the factual situation herein involved, are inapplicable. The same argument has several times been held by this Court to be untenable (Point III).

Petitioners' contention that the ordinances do not unduly burden interstate commerce is refuted by the fact that the tax alone (even without taking into account the bond, health and other features) is in excess of many of the

taxes invalidated by this Court. Nor can the ordinances be sustained under the police power (Point III, subs. B and C).

All the remaining questions presented by petitioners are non-federal questions and in any event were correctly decided upon State grounds adequate to sustain them (Point IV).

POINT I

The decision in this case that the ordinances, as applied to respondent, contravene the Commerce Clause is in accord with and controlled by numerous applicable decisions of this Court.

The ordinances as applied to respondent fasten their grip directly and solely on interstate commerce by requiring a license and exacting a fixed-sum privilege tax for its transaction. Moreover, discrimination against interstate commerce, and not equality, is the very core of the ordinances and results from their practical operation. Legislation of that character has uniformly been held invalid by this Court.

Nippert v. *Richmond,* 327 U. S. 416;
Best & Co. v. *Maxwell,* 311 U. S. 454;
Real Silk Mills v. *Portland,* 268 U. S. 325;
Davis v. *Virginia,* 236 U. S. 697;
Stewart v. *Michigan,* 232 U. S. 665;
Rogers v. *Arkansas,* 227 U. S. 401;
Crenshaw v. *Arkansas,* 227 U. S. 389;
Dozier v. *Alabama,* 218 U. S. 124;
Rearick v. *Pennsylvania,* 203 U. S. 507;
Norfolk & West. Ry. Co. v. *Sims,* 191 U. S. 441;
Caldwell v. *North Carolina,* 187 U. S. 622;
Stockard v. *Morgan,* 185 U. S. 27;
Brennan v. *Titusville,* 153 U. S. 289;

Stoutenburgh v. *Hennick,* 129 U. S. 141;
Asher v. *Texas,* 128 U. S. 129;
Corson v. *Maryland,* 120 U. S. 502;
Robbins v. *Shelby Taxing District,* 120 U. S. 489.

See also:

Crutcher v. *Kentucky,* 141 U. S. 47;
Lyng v. *Michigan,* 135 U. S. 161;
Leloup v. *Port of Mobile,* 127 U. S. 640;
Welton v. *State of Missouri,* 91 U. S. 275.

The law on this subject is so firmly intrenched that more than thirty years ago Mr. Justice Holmes considered it "established"[5] And since then it has been reaffirmed on eight occasions.

Not only has the principle become rooted in our law, but it was specifically applied by this Court to the *identical* state of facts involved herein. In *Best & Co.* v. *Maxwell, supra,* the *amicus curiae* herein was the appellant. The display of samples in that case took place in Winston-Salem, North Carolina, and recovery of tax paid under protest was the relief prayed for, whereas in this case the exhibit occurred in Omaha and an injunction against enforcement of the ordinances was sought. Aside therefrom, there is not so much as a hair's difference between the two cases.

That factor may explain, in some measure, why certiorari is being sought only in the instant case (wherein Frank Brothers Footwear, Inc., is the plaintiff) and not in the companion *Best & Co.* case.[6]

The decision of the Court below is also in harmony with the unanimous decisions rendered by the Courts of last

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[5] *Rearick* v. *Pennsylvania, supra,* at p. 510.

[6] The time within which to apply for certiorari in the companion *Best & Co.* case has expired, and consequently the decision of the Court below in that case, adverse to the petitioners herein (who are also the defendants and interveners therein), is now final.

resort of other States. *State* v. *Yetter* (an employee of Best & Co.), 192 S. C. 1, 5 S. E. (2d) 291; *State of Louisiana* v. *Best & Co.*, 194 La. 918, 195 So. 356.

It is likewise in accord with an earlier decision of the Nebraska Court of first instance in which the case at bar was tried.[7] Decisions to the same effect involving Best & Co. or its representatives have been rendered by Courts in Arkansas, Florida, Michigan, Missouri, Ohio, Oklahoma, Pennsylvania and Virginia.[8]

POINT II

The attempted distinction that petitioners seek to draw between *Best & Co.* v. *Maxwell* and the case at bar is both inaccurate and ineffectual.

The petitioners do not assert (nor could they) that there is even the slightest difference between the activities of the respondent herein in Omaha and those of Best & Co. in Winston-Salem involved in the *Maxwell* case, which this Court found constituted interstate commerce within the purview and protection of the Commerce Clause.

Instead, they say that the *Maxwell* case involved "patent discrimination against interstate commerce", whereas here there is "no distinction between residents or non-residents, intrastate or interstate operations" (Br., p. 18).

The fact is that, just as in the instant case, the North Carolina statute involved in the *Maxwell* case, as Mr. Justice Reed held, "nominally" taxed "all who are not regular

[7] In 1926 the representative of the *amicus curiae* herein was convicted of violating ordinances of the City of Omaha similar to those challenged in the instant case. On appeal to the District Court for Douglas County, Nebraska, the complaint was dismissed, the Court holding that Best & Co.'s business "was exclusively interstate commerce" and that the ordinances were "unconstitutional and void". The decision is unreported.

[8] The decisions are not officially reported.

retail merchants in North Carolina, regardless of whether they are residents or non-residents". But that did not save the statute, because in its practical operation it was found to be discriminatory in that payment of the tax "required of out-of-state retailers but not of their real local competitors, can operate only to discourage and hinder the appearance of interstate commerce in the North Carolina retail market" (pp. 456-457).

The very same criticism, or even stronger, can be accurately leveled at the Omaha ordinances challenged herein.

That not one member of the two intervening associations of retail merchants pays any occupation or privilege tax, in a fixed-sum or otherwise, gives a fairly clear indication of whether the ordinances are intended to discriminate.

The Omaha ordinances are, if anything, more onerous than was the North Carolina statute held invalid in the *Maxwell* case. The latter exacted $250 a *year*. The Omaha tax is $15 a *day, plus* a license fee of $1 for each solicitor, *plus* a $5,000 surety bond, *plus* medical certificates from a Nebraska physician, *plus* an appearance at a hearing before the City Council, *plus* a personal appearance before the City Clerk.

The North Carolina statute at least went through the form of imposing a fixed-sum license tax of $1 a year on local merchants. In Omaha not even that pretense is observed. Additionally, North Carolina merchants also paid, besides real and personal property taxes, income, franchise, and sales taxes, none of which is paid by local merchants in Omaha.

In short, the distinction claimed by petitioners between the *Maxwell* case and the instant case can be recognized only (to paraphrase Mr. Justice Frankfurter [9]) if a distinction without a difference makes a difference.

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[9] *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402, 415.

POINT III

The authority of the "drummer cases", as applied to the factual situation herein involved, is unimpaired. The ordinances cannot be sustained on any of the other grounds asserted by petitioners.

The very same contentions as are made by petitioners herein were made and held to be without merit in both *Best & Co.* v. *Maxwell* and *Nippert* v. *Richmond, supra.*

We do not therefore believe it to be necessary or appropriate to answer each of the points mentioned in their labored argument, especially since they cite cases recklessly and indiscriminately and without regard to their facts and their holdings. Many of the cases cited and quoted from do not stand for the propositions for which they are cited, and others are authority for precisely the converse. Incomplete and fragmentary excerpts are taken from their context to suggest a meaning not conveyed by, or at variance with, the decision itself. And a considerable part of the brief consists, in effect, of elaborate shadow boxing with non-existent opponents; the points discussed in them are neither controversial nor in any way applicable.

We shall accordingly confine ourselves to their principal contentions, which will suffice to show the frivolous nature of the petition.

A

The cases cited by petitioners are inapplicable.

The petitioners cite no direct authority in support of the validity of the ordinances or of their contention that the rule of *Robbins* v. *Shelby Taxing District, supra,* is outmoded or inapplicable herein. We pointed that out in the Court below, and in their motion for rehearing petitioners stated at page 27 of their brief as follows:

> "But we are challenged to point out that *Robbins* v. *Shelby County Taxing District, supra,* and its sequelae have been overruled. We acknowledge our inability to do so."

That not one of the "drummer cases" has ever been overruled or even criticized, as applied to the factual situation herein involved, and that they have been consistently cited with approval, petitioners ascribed in the Court below to this Court's idiosyncrasy". Now petitioners, being before another tribunal, take the position that the Court below in its opinion "does not mention" some of the cases upon which they rely; from that they apparently seek to infer that the cases were overlooked or, to use petitioners' own picturesque language, the Court "turned a blind eye" on them (Pet. and Br., pp. 7, 8, 28).

What actually transpired in the Court below, as its opinion clearly discloses, was that petitioners argued a "new trend" was started by *Western Live Stock* v. *Bureau,* 303 U. S. 250, and followed by several other so-called leading cases. Each of the cases thus relied upon was separately reviewed and distinguished in the opinion, which makes it clear that the Court's observations were not confined to the particular cases specifically mentioned, but encompassed all those named by petitioners. So many were cited by them that it would have been impractical, as well as wholly unnecessary, to give separate consideration to each in the opinion.

In any event, not one of the cases to which petitioners now refer involves the application of the principle of the "drummer cases" to a fixed-sum privilege tax on the solicitation of orders in interstate commerce.

Memphis Natural Gas Company v. *Stone,* 335 U. S. 80, does not, as petitioners herein assert;[10] purport to overrule, criticize, or depart from the "drummer cases". As the opinion expressly states, it relates solely to "the field of pipeline taxation". Both *Best & Co.* v. *Maxwell* and *Nip-*

[10] Pet. and Br., pp. 7, 8, 9, 28-29.

pert v. *Richmond* are cited therein. That decision, as we read it, stands for the proposition that a tax upon the permanent maintenance within a state of a substantial pipeline and compressor stations is not within the inhibition of the Commerce Clause, especially where (as there) the tax was not discriminatory as it was also levied on all Mississippi corporations.

Independent Warehouse v. *Scheele,* 331 U. S. 70, involved a tax "on the business of the storage of personal property in a warehouse engaged in storing goods for hire". It does not enunciate any legal doctrine that is applicable to the instant case. It follows the principle stated in *Minnesota* v. *Blasius,* 290 U. S. 1, namely, that when goods have come to rest and acquired an intra-state situs, they are subject to local non-discriminatory taxation.

Joseph v. *Carter & Weekes Co.,* 330 U. S. 422, involved a New York City excise tax on the gross receipts of a stevedoring corporation engaged wholly within the territorial limits of the City in loading and unloading vessels moving in interstate commerce. In holding the tax to be invalid, this Court stated, at page 433, as follows:

> "Although state laws do not discriminate against interstate commerce or in actuality or by possibility subject it to the cumulative burden of multiple levies, those laws may be unconstitutional because they burden or interfere with commerce. See *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 767. Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid."

Freeman v. *Hewit,* 329 U. S. 249, held that an Indiana gross income tax could not constitutionally be applied to receipts from securities sales effected by an Indiana fiduciary on the New York Stock Exchange. The two excerpts from the prevailing opinion quoted on page 24 of petitioners' brief illustrate how incomplete quotations may be slanted to give the opposite effect from that contained in

the decision. The first quotation consists of only a portion of a sentence, it is immediately followed by the sentence hereinbelow quoted (which petitioners omitted), namely:

> "To deny to a State a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a State's ability to carry on its local function" (p. 253).

The two quotations are one and one-half pages removed from each other; in the portion of the opinion preceding the second quotation, appears the following:

> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. It cannot justify what amounts to a levy upon the very process of commerce across States lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce" (p. 254).

Richfield Oil Corp. v. *State Board,* 329 U. S. 69, did not involve the Commerce Clause, but was concerned with the constitutional provision prohibiting imposts or duties on imports and exports. Under that clause a California tax was invalidated. *Best & Co.* v. *Maxwell* is cited at page 76.

As far as *Nippert* v. *Richmond, supra,* is concerned, it is little less than ludicrous for petitioners to cite it in support of their contention. That decision squarely condemns

ordinances of the character challenged herein, holds that the "drummer cases" have not been overruled by the recent decisions of this Court, and distinguishes many of the decisions upon which petitioners rely. In referring to the very type of tax here in question, the Court held:

> "It may be, as the Court said in the *Berwind-White* case, that the State is free to allow its municipal subdivisions to erect such barriers against each other, to some extent, as to the commerce over which the State has exclusive control. It cannot so outlaw or burden the commerce of the United States."

B

Ordinances exacting smaller taxes have been invalidated.

Petitioners argue that the occupation tax in question does not impose an undue burden and that higher taxes have been upheld (Pet. and Br., pp. 8-9, 33). None of the cases to which petitioners refer involved a tax on the solicitation of orders for interstate commerce.

Even without considering the bond, health and other onerous burdens imposed by the Omaha ordinances, the tax alone is larger than many of the taxes that were stricken down by this Court in the cases cited in Point I, *supra*. The following are some of such taxes:

Case	*Amount of Tax*
Robbins v. *Shelby Taxing District*	$10 a week or $25 a month.
Corson v. *Maryland*	$15 a year and up, graduated according to stock on hand.
Asher v. *Texas*	$35 a year.
Brennan v. *Titusville*	$1.50 a day, $5 a week, $10 for 3 months, and $25 a year.
Stockard v. *Morgan*	$20 a year.
Caldwell v. *North Carolina*	$10 a year.
Real Silk Mills v. *Portland*	$12.50 quarterly and $500 bond.

C

The ordinances cannot be sustained under the police power.

Petitioners assert that the ordinances constitute a legitimate exercise of the municipality's police power (Pet., p. 9). That argument has been answered by this Court, which has held that a tax on the solicitation of interstate sales cannot be sustained under either the taxing or police powers. *Freeman* v. *Hewit, supra; Brennan* v. *Titusville, supra.*

POINT IV

The remaining questions presented by petitioners are non-federal in nature, and were correctly decided below.

A

Dismissal of petitions in intervention.

Petitions to intervene, filed by two associations of local retail merchants (R. 18-19), were dismissed by the Court below, which held that, under a Nebraska statute, the associations did not have an adequate interest in the litigation to qualify for intervention, and that "The rule to which this jurisdiction is committed is: 'When public officers are engaged in litigation to protect public rights, and their pleadings and procedure maintain the public interest, no private person is entitled to intervene.'"

Question 9 presented by the petition herein is whether intervention by the associations was "justified" (p. 6). Petitioners do not claim that the action of the Court below violated any provision of the federal constitution.

The associations are in the inconsistent position of asserting on one hand that they have been deprived of the status of interveners and not allowed to present their case, and on the other hand that they are not interlopers and are entitled to file a petition for certiorari herein.

The associations do not assert that the defendants or their counsel are incompetent or unwilling to protect any rights which the City of Omaha may have or that they have been derelict in discharging their public duties or responsibilities. They do not mention a single step that they were precluded from taking, or argument as to the merits that they were unable to advance or that was not heretofore or is not now being put forward.[11]

This is a simple issue of State practice and procedure, based on local laws.

B

Granting injunctive relief.

The Court below directed the issuance of a permanent injunction restraining the defendants from enforcing the ordinances against respondent (R. 94). It held that, under Nebraska statutes and decisions, injunctive relief was the proper procedural remedy herein, and that because respondent and the *amicus curiae* herein (the appellants in the Court below) "could test the regularity of the ordinance and its amendment by subjecting their representative to criminal prosecution and by having their business and property rights interfered with is not a sufficiently adequate remedy to preclude" injunctive relief (R. 87).

Question 10 presented by the petition herein is "whether an injunctive remedy is available to respondent" (R. 6). The claim is not that issuance of the injunction contravened any provision of the federal Constitution, but only whether discretion should have been exercised in favor of granting it (Br., p. 35).

Matters affecting the remedy are governed by the law of the forum. Like the preceding question, this involves nothing but State law. Even if the question were cognizable in this Court, it is no longer an open one, having

[11] The interveners were permitted to file answers (R. 21-36), participate in the trial (R. 69-75), and they also filed a brief and their counsel presented oral argument in the Court below.

been clearly answered in *Real Silk Mills* v. *Portland*, 268 U. S. 325; *Terrace* v. *Thompson*, 263 U. S. 197, 214; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 386.[12]

C

Whether the appeal in the Court below was moot.

The final question posed by petitioners is whether the appeal became moot in the Court below and should have been dismissed (Pet. and Br., pp. 7, 11, 36). A formal motion for such relief was made there by petitioners (R. 46-60) and overruled; in its opinion the more than adequate grounds therefor, as well as the contentions of petitioners, are so clearly set forth (R. 83-85) as to make a restatement thereof superfluous here.

A State Court is the judge of its own jurisdiction (*Seattle & Renton Ry.* v. *Linhoff*, 231 U. S. 568, 570), and, in any event, there is no claim by petitioners that any rights which they may have under the federal Constitution were invaded by the decree of the Court below. Moreover, this cause presents a real dispute, and an actual, acute controversy. Nothing has transpired since the inception of the litigation to indicate that the defendants have relaxed or changed their admitted intention of enforcing the invalid ordinances against respondent, the *amicus curiae* herein, and any and all others who endeavor to exercise their right to solicit orders in Omaha for interstate fulfillment, with consequent multiplicity of criminal prosecutions of their representatives and irreparably injurious interference with their respective businesses.

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[12] Petitioners herein cite *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, in which federal equity jurisdiction was sought to be invoked to enjoin a criminal prosecution in a state court under a state law. This Court held that "The federal courts are without jurisdiction to try alleged criminal violations of state statutes. The state courts are the final arbiters of their meaning and appropriate application" (pp. 49-50).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 507

CITY OF OMAHA, a Municipal Corporation; CHARLES W. LEEMAN, Mayor; PAUL HAZE, Chief of Police; EDWARD F. FOGARTY, City Attorney; ASSOCIATED RETAILERS OF OMAHA, a Corporation; and OMAHA MASTER FURRIERS GUILD, an Unincorporated Association, *Petitioners,*

vs.

FRANK BROTHERS FOOTWEAR, INC., a Corporation, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA IN BEHALF OF THE MEMBER CITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICI CURIAE

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Exhibit A. *Municipal Regulation of Peddlers, Solicitors and Itinerant Merchants.* Report No. 118 of the National Institute of Municipal Law Officers (1947).

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STATEMENT

The petition for certiorari in this case seeks review of a final judgment of the Supreme Court of Nebraska in *Frank Brothers Footwear, Inc.* v. *City of Omaha et al.*, 149 Neb. 888, 33 N. W. (2d) 161 (1948), reversing and remanding a judgment of the District Court in and for Douglas County, Nebraska, and directing that the Petitioners be permanently enjoined from enforcing the Omaha Itinerant Vendors' Ordinance.

FACTS OF THE CASE

The case involves the constitutionality of a municipal occupation tax of fifteen (15) dollars a day imposed, for revenue purposes, by the Omaha Municipal Code upon itinerant vendors who solicit orders for, make local displays of, or take orders for merchandise. The Ordinance also requires a permit licensing such operations and imposes certain Surety Bond and Health Certificate requirements as conditions precedent to the issuance of a permit.

The Respondent, a New York corporation, is engaged in the retail sale of footwear and allied products. Through sales representatives it displays samples of merchandise and takes orders for future delivery, subject to acceptance at its home office. It has been the practice of the Respondent for over twenty-five (25) years to solicit orders by biannual displays at hotel stands or other premises in the City of Omaha. The displays have been of two or three days' duration and have been preceded by advertising campaigns.

The Respondent brought suit against the City of Omaha and others to enjoin the enforcement of the Omaha Itinerant Vendors' Ordinance. The Lower Court denied relief, but the Supreme Court of Nebraska reversed and remanded, holding that the Ordinance in question directly and unlawfully regulated and burdened interstate commerce in violation of Article 1, Section 8, of the Constitution of the United States.

IMPORTANCE OF THE CONSTITUTIONAL ISSUE PRESENTED

The question of the constitutionality of the Omaha Itinerant Vendors' Ordinance is of vital importance to thousands of municipalities and other taxing authorities throughout the United States. This brief in support of the petition for certiorari herein is filed in behalf of the 520 member cities of the National Institute of Municipal Law Officers and the millions of local citizens resident therein.

Today the financial status of our municipalities and other local governmental units is critical. Rising costs, the expanding responsibilities of local government and the decline in revenues received from traditional sources have all served to highlight the problem. Increased state and Federal taxing activity has closed the doors on many possible sources of local revenue. As a result, many communities have renewed their activities in searching for methods, whereby many of those who have been receiving "free rides" at the expense of local citizens may be required to contribute their fair share of the cost of local government. Among those sought to be taxed have been itinerant vendors, solicitors and peddlers and other interstate businesses. In taxing these activities, municipalities have been confronted with the problem of requiring a reasonable exaction without transgressing the boundaries of the Commerce Clause as delineated by this Court.[1]

Equally important has been the task of regulating the activities of itinerant vendors, solicitors and peddlers for too often such activities have proved to be effective vehicles for fraud, deceit and imposition. Again municipalities

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[1] See *Municipal Regulation of Peddlers, Solicitors and Itinerant Merchants*, Report No. 118, National Institute of Municipal Law Officers, (1947), filed herewith as Exhibit A.

have been confronted with the dilemma of enforcing reasonable regulations designed to protect local citizens against such practices without transcending the limits of permissible regulation under the Commerce Clause.[2]

The recent pronouncements of this Court in defining the permissible scope of local regulation and taxation under the Commerce Clause have emphasized time after time that the validity of local legislation is not to be determined by abstract principles of constitutional law but rather by realities and practical considerations. It is manifest, however, from the opinion of the Supreme Court of Nebraska in the present case that archaic legal formulas and syllogisms rather than practical considerations were the basis of that Court's decision. It is respectfully submitted that the Supreme Court of Nebraska fell into error in reaching the result that it did; for not only does the rationale of the Nebraska decision misinterpret the purpose of the Commerce Clause, but it also misconstrues the true and proper relationship of local, state and Federal governments in the application of the Commerce Clause.

It is not to be denied that the fundamental purpose of the Commerce Clause was to create a national market unrestricted by local trade barriers. However, that purpose should not be expanded to the point where interstate commerce is actually placed in a preferred position by being given all local government services "free." The rationale of the decision of the Supreme Court of Nebraska in effect creates and grants a subsidy to those engaged in interstate traffic at the expense of local enterprise. Surely, this is more than the Commerce Clause requires. Therefore, it is respectfully submitted, in view of the circumstances of this case, that certiorari be granted to review the judgment of the Supreme Court of Nebraska.

---

[2] *Ibid*, p. 124.

ARGUMENT

A Municipality May, in the Exercise of Its Police Power, Regulate the Activities of Itinerant Vendors and May Also Require Them to Contribute Their Fair Share of the Costs of Local Government. The Fact That Such Measures Affect Interstate Commerce Does Not, in and of Itself, Invalidate Them. Only if Such Regulatory and Fiscal Measures Are Hostile Toward, Discriminate Against, or Unduly Burden Interstate Commerce Will They Be Held Inconsonant with the Great Purpose of the Commerce Clause.

1. Interstate Commerce Is Not Immune from Local Taxation or Regulation

Departing from the formalism and rigid conceptualism of another day, this Court, in recent years, has consistently held that the Commerce Clause is not an absolute bar on local taxation affecting interstate commerce and that interstate commerce may be made to pay its own way. In *McGoldrick* v. *Berwind-White Coal Co.*, 309 U. S. 33, this Court said:

> "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing business. *Western Live Stock* v. *Bureau*, 303 U. S. 250, 254. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress."

This view was also acknowledged in *Nippert* v. *City of Richmond*, 327 U. S. 416, when this Court stated:

> "There is no lack of power in the state or municipalities to see that interstate commerce bears with local trade its fair share of the cost of local government, more especially in view of recent trends in this field."

Again, in the concurring opinion in *Freeman* v. *Hewitt*, 329 U. S. 249, it was stated that:

> "The Commerce Clause was not designed or intended to outlaw all state taxes bearing 'directly' on interstate commerce. Its design was only to exclude those having the effects to block or impede it which called it and the Constitution itself into being. Not all state taxes, nor indeed all direct state taxes, can be said to produce those effects.
>
> "This Court has gone far in sustaining state taxes laid upon local incidents of interstate transactions by both of the state of origin and the state of the market in recent years. Perhaps it may be said, in view of such decisions, that it has more clearly sustained such taxes at the marketing end than by the state of origin, although this may be a matter of debate."
>
> "The trend of recent decisions has been toward sustaining state taxes formerly regarded as outlawed by the Commerce Clause."

In *Stone* v. *Interstate Gas Co.*, 103 F. (2d) 544 (CCA 5th-1939), (aff'd *per curiam*, 308 U. S. 522) the Court of Appeals in upholding a Mississippi franchise tax, stated:

> "Any immunity from general taxation appears more and more inconvenient and unjust. The recent re-examination of the basis for such immunities has resulted in upheaval. The current of authority has been turned.
>
> "A basic principle is that taxation is vital both to the State and National Governments; to be concurrently exercised by both with as little interference as possible one with the other. Another basic principle is that immunity from taxation ought to be jealously regarded.

> "An implication of immunity based on constitutional provisions ought to be a necessary implication and to extend no further than the necessity requires; and this especially when the immunity is invoked not in behalf of a government but a citizen or private corporation. It is clear also that because a matter is regulable only by one government it is not thereby exempted from just taxation by the other.
>
> "Conversely, the clause of the Federal Constitution vesting exclusive power to regulate interstate and foreign commerce in Congress ought not of itself to exempt such commerce and those who carry it on in a State from a decent and non-discriminatory State taxation."

Similarly, this Court, in endeavoring to maintain the proper balance between local and national power and interests, has often stated that the Commerce Clause does not preclude municipalities and states from exercising their police power in matters of legitimate local concern, even though they may thereby affect interstate commerce. This proposition was acknowledged in *Eichols* v. *Public Service Commission*, 306 U. S. 268, when this Court stated:

> "But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected."

In *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, it was said:

> "For, concurrently with the broadening scope for permissible application of federal authority, the tendency has also run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce, and to doing so by a new, or renewed emphasis on facts and practical considerations rather than on dogmatic logistic."

Accord: *Parker* v. *Brown*, 317 U. S. 341; *Edwards* v. *California*, 314 U. S. 160; *Carter* v. *Virginia*, 321 U. S. 131; and *Patapsco Guano Co.* v. *Board of Agriculture*, 171 U. S. 345.

See also cases collected in the *Minnesota Rate Cases*, 230 U. S. 352, 403-411.

In view of the pronouncements of this Court cited above, it is respectfully submitted that the City of Omaha may, in the exercise of legitimate local power, tax and regulate the activities of itinerant vendors and solicitors and that such measures are not to be declared invalid merely because they may affect interstate commerce.

2. In the Absence of Congressional Action, Local Taxation and Regulation Affecting Interstate Commerce Will Only Be Declared Invalid if Such Commerce Is Discriminated Against or Unduly Burdened

It has been repeatedly held by this Court that the fundamental purpose of the Commerce Clause is to promote free intercourse between the states by protecting interstate commerce from discriminatory or destructive local action. *McGoldrick* v. *Berwind-White Coal Mining Co.*, *supra*. And, as it has been stated, not all burdens upon interstate commerce, but only *undue* and *discriminatory* ones are forbidden. *Nippert* v. *City of Richmond*, *supra*. Discrimination against interstate commerce, like interstate commerce itself, is a practical conception and must involve a substanital discrimination and injury. *Greenville* v. *Query*, 286 U. S. 472.

It is respectfully submitted that the Omaha Ordinance in question does not discriminate against interstate commerce. It applies equally to itinerant vendors from Lincoln and those from New York as well as to residents of Omaha who do not have established places of business there.

Nor may it be said that the tax unduly burdens interstate commerce. The mere fact that it increases the cost of doing business does not make it an undue burden. *Coverdale* v. *Arkansas-Louisiana Pipe Line Company*, 303 U. S. 604. Vendors coming under the purview of the Ordinance receive the benefits of all the local governmental services and it cannot be said that they are unduly burdened because they must pay their fair share toward the costs of those services.

3. The Constitutionality of a Municipal Ordinance Is Not to Be Determined By Conjecture or Abstractions. A Party Seeking to Have an Act Struck Down As Inconsonant with the Commerce Clause Must Show That It Is Unconstitutional As Applied to Him

In *Southern Railway* v. *King*, 217 U. S. 524, it was said:

> "It is the settled law of this Court that one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operated to deprive him of rights protected by the Federal Constitution."

Accord: *Gorieb* v. *Fox*, 274 U. S. 603; and *Premier Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226.

Similarly, this Court in *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, in discussing the actual factual situation before the Court, stated:

> "Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determine whether a given tax prohibitively discriminates against interstate commerce. Hence, a review of prior adjudications based on widely disparate facts, howsoever in general propositions, does not facilitate an answer to the present problem."

In *Best & Co.* v. *City of Omaha et al.*, 149 Neb. 868, 33 N. W. (2d) 150, which was cited by the Supreme Court of Nebraska as controlling the instant case, both opinions being handed down the same day, great reliance was placed upon *Best & Co.* v. *Maxwell*, 311 U. S. 454 and *Nippert* v. *City of Richmond, supra.* It is submitted that neither of the above decisions are controlling in the instant case.

In *Best & Co.* v. *Maxwell, supra,* the tax was laid on every person and corporation not a retail merchant in North Carolina and in practical effect discriminated against interstate commerce. Such is not the case here. The Omaha Ordinance makes no distinction between residents or nonresidents or between interstate and intrastate commerce. It applies equally to *all* itinerant vendors who do not have established places of business in the City of Omaha. It treats an itinerant vendor for a Nebraska manufacturer exactly the same as it treats itinerant vendors for manufacturers located in other states.

It is respectfully submitted that the Supreme Court of Nebraska erroneously relied upon *Nippert* v. *City of Richmond, supra.* The facts of that case and the language of the majority opinion would seem to preclude its application here. As has been previously stated, the Respondent has been carrying on the activity sought to be taxed for over twenty-five years in the City of Omaha, averaging two visits each year. Such were not the facts in the *Nippert* case. This court, in that decision stated:

> "In view of the ruling in *International Shoe Co.* v. *Washington*, 90 L. ed. (Adv. 109), 66 S. Ct. 154, *supra,* we put aside any suggestion that 'solicitation,' when conducted regularly and continuously within the state, so as to constitute a course of business, may not be 'doing business' just as is the making of delivery, at any rate for the purpose of focusing a tax which in other respects would be sustainable.

> "We are not unmindful that large enterprise which 'does business' by sending solicitors regularly and continuously into several states, cf. *International Shoe Co.* v. *Washington,* 326 U. S. 310, 90 L. ed. (adv. 109), 66 S. Ct. 154, *supra,* may have the financial resources and established course of business enabling it to absorb the tax and justify its doing so in the economic sense; or, that, therefore, if the ruling should extend to such a situation, the business so situated would escape to that extent bearing the burden of the tax borne by local businesses similarly situated, absent some other form of tax to equalize the burden. But, in the first place, no such case is presented by the facts here."

The record in the *Nippert* case contained nothing to show that the appellant had engaged in solicitation in Richmond at any time other than during the one five-day period there in question.

It is submitted that the Respondent here, by its past conduct, has taken itself out of that class of persons who might attack the constitutionality of the Omaha Ordinance, if in fact there be any ground for attack. The Respondent, by a regular and established course of business, has, for many years, taken advantage of the protection and other services offered by the City from local revenues. There would seem to be little doubt as to the city's jurisdiction to tax and there was no showing whatsoever by the Respondent that the tax did *in fact* unduly burden interstate commerce; the amount thereof certainly does not raise any presumption of such fact.

CONCLUSION

In view of the importance of the constitutional issue presented here to thousands of municipalities who are vitally interested in the regulation and taxation of itinerant vendors, it is respectfully submitted that the case be reviewed and re-examined by this Court. The recent decisions of this Court in *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80, and *Independent Warehouses, Inc.* v. *Scheele*, 331 U. S. 70, would appear to cast considerable doubt as to correctness of the result and reasoning of the Supreme Court of Nebraska in the instant case. The fiscal needs and regulatory problems of local government are not answered by the decision of the Nebraska court. The imperative character of these problems stresses the need for this Court's determination of the issue presented.

Respectfully submitted,

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